No. 91-111

In the Supreme Court of the United States

OCTOBER TERM, 1991

LIVINGSTON CARE CENTERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under 42 U.S.C. 405(h), as incorporated into the Medicare Act, review of decisions of the Secretary of Health and Human Services by any "tribunal" is barred except as provided in the Act itself, and claims "arising under" the Act may not be brought under the general jurisdictional grants in 28 U.S.C. 1331 and 1346. The question presented is:

Whether 42 U.S.C. 405(h) bars a suit against the United States under the Federal Tort Claims Act, and against an individual employee of the Secretary under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), to recover damages for an allegedly wrongful termination of a reimbursement agreement between the Secretary and a Medicare provider.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-444

LIVINGSTON CARE CENTERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-28) is reported at 934 F.2d 719. The opinion of the district court (Pet. App. 17-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. The petition for a writ of certiorari was filed on August 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Part A of the Medicare program, which is established by Title XVIII of the Social Security Act (hereinafter the Medicare Act), provides reimburse-

ment to hospitals and other health care providers for certain medical services they furnish to elderly and disabled individuals. See 42 U.S.C. 1395 *et seq.* Provider participation in the Medicare program is voluntary. However, once a provider agrees to participate, it is obligated to follow applicable statutory and regulatory requirements and the terms of its provider reimbursement agreement with the Secretary. 42 U.S.C. 1395cc(a); 42 C.F.R. 489.20-489.22.

The Health Care Financing Administration (HCFA) in the Department of Health and Human Services may terminate a reimbursement agreement with a provider that fails to comply substantially with the requirements of the Act, regulations, or agreement. 42 U.S.C. 1395cc(b)(2); 42 C.F.R. 489.53; 42 C.F.R. 498.3(b). HCFA must notify the provider and the public of the termination and furnish an opportunity for a hearing before an administrative law judge (ALJ), in the same manner as is provided in 42 U.S.C. 405(b) for benefit claims under Title II of the Social Security Act. 42 U.S.C. 1395cc(h)(1); 42 C.F.R. 498.5(b). If the provider is dissatisfied with the ALJ's decision, it may seek review by the Appeals Council. 42 C.F.R. 498.5(c); 42 C.F.R. 498.82. A provider then has a right to seek judicial review, in the same manner as is provided in 42 U.S.C. 405(g) for claims under Title II. See 42 U.S.C. 1395cc(h)(1).

Other judicial remedies are barred by 42 U.S.C. 1395ii, which incorporates 42 U.S.C. 405(h) into the Medicare Act. Section 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be

> reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

See *Weinberger* v. *Salfi*, 422 U.S. 749, 756-762 (1975); *Heckler* v. *Ringer*, 466 U.S. 602, 614-617 (1984); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 678-681 (1986).

2. Petitioner Livingston Care Center, a subsidiary of petitioner Care Centers of Michigan, Inc., was a provider of Medicare services. In the summer of 1986, the Michigan Department of Public Health recommended that HCFA terminate Livingston's participation in the Medicare program. HCFA found that Livingston had failed to comply with the provisions of its provider reimbursement agreement. Accordingly, it terminated the agreement effective October 2, 1986, which had the effect of terminating Livingston's participation in the Medicaid program as well. Pet. App. 17, 21-22. Livingston pursued the administrative remedies provided by the Medicare Act and implementing regulations. On June 30, 1989, an ALJ reversed HCFA's decertification determination, holding that Livingston had complied with its statutory and contractual responsibilities and that the Michigan Department of Public Health had erred in recommending decertification. *Id.* at 23.[1]

3. Petitioners then brought this suit for damages against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680,

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[1] The Appeals Council subsequently denied HCFA's request for review. Pet. App. 23, 29-30.

alleging negligence in the termination and a denial of due process. Petitioners also sought damages from respondent Robert Spain, a HCFA employee, under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The district court granted the motion to dismiss filed by the United States and Spain. Pet. App. 17-20. It held that the FTCA action is barred by 42 U.S.C. 405(h) because "plaintiff's cause of action arises under the Social Security Act and * * * Congress has provided a meaningful remedy for the wrong claimed by the plaintiff." Pet. App. 20. In addition, following *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), the district court held that the *Bivens* action against Spain is precluded by the comprehensive nature of the statutory scheme, which furnished Livingston a meaningful remedy. Pet. App. 20.

4. The court of appeals affirmed, holding that the district court lacked jurisdiction to hear any of Petitioners' claims. Pet. App. 21-28. The court reasoned that "[t]he plain language of [42 U.S.C.] 405(h), as incorporated by [42 U.S.C.] 1395ii, precludes the federal courts from entertaining claims based on the jurisdictional provisions of the Tort Claims Act, § 1346 of Title 28, or the statutory grant of jurisdiction over federal questions, § 1331 of Title 28, if the claims 'arise under' the Medicare Act." Pet. App. 25. The court concluded that because petitioners' claims stem entirely from the termination of Livingston's participation in the Medicare program under procedures adopted pursuant to the Medicare Act, their claims "arise under" the Act within the meaning of the third sentence of 42 U.S.C. 405(h), and therefore are barred. Pet. App. 26.

The court of appeals also rejected petitioners' assertion that the application of Section 405(h) in this

case violates due process. Pet. App. 27-28. Relying on *Salfi*, the court pointed out that the "plain words of the third sentence of § 405(h) do not preclude constitutional challenges," but "simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under [the] Act." Pet. App. 27 (quoting 422 U.S. at 762). The court determined that although 42 U.S.C. 1395cc(h)(1) provides for judicial review of termination decisions made by the Secretary, "it cannot be stretched to include review in an action for consequential damages resulting from wrongful termination. Congress proscribed such claims when it enacted [42 U.S.C.] 1395ii." Pet. App. 28.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. To the contrary, the ruling below is consistent with holdings by other courts of appeals that 42 U.S.C. 405(h) bars FTCA suits arising out of the administration of the Social Security Act, including its Medicare provisions. The Court recently denied review in another case in which a Medicare provider's damage claims were found to be barred by Section 405(h). See *Bodimetric Health Services, Inc.* v. *Aetna Life & Casualty*, 903 F.2d 480 (7th Cir.), cert. denied, 111 S. Ct. 579 (1990). There is no reason for a different disposition here.

1. a. Petitioners' attempt to invoke the FTCA to recover damages against the United States is foreclosed by two separate provisions of 42 U.S.C. 405(h). The second sentence of Section 405(h) states that "[n]o findings of fact or decision of the Secre-

tary shall be reviewed by any person, *tribunal*, or governmental agency *except as herein provided*" (emphasis added). In this FTCA suit, petitioners necessarily request a "tribunal" (the federal district court) to "review[]" HCFA's initial "decision" terminating the provider reimbursement agreement with Livingston and to find that the decision was both erroneous and negligent. Under the Medicare Act, however, a damage action against the United States pursuant to the FTCA is not the method "herein provided" for review of such a decision by HCFA. Rather, the method of review expressly prescribed by 42 U.S.C. 1395cc(h)(1) is for the provider to request a hearing under 42 U.S.C. 405(b) and then, if necessary, to seek judicial review under 42 U.S.C. 405(g). Livingston in fact pursued that course and obtained relief following a hearing by an ALJ, who reversed HCFA's decision. Congress has not authorized the award of consequential damages in administrative and judicial proceedings under 42 U.S.C. 405(b) and (g). See *Chilicky*, 487 U.S. at 424-426. A provider cannot circumvent that limitation by suing for consequential damages under the FTCA, since the FTCA suit would require a federal "tribunal" to review HCFA's "decision" in a manner other than that provided in the Medicare Act itself.

The third sentence of Section 405(h) compels the same result. It states that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter [*i.e.*, the Medicare Act]." Section 1346(b) of Title 28 confers jurisdiction on the district courts over FTCA suits against the United States. Accordingly, the third sentence of Section

405(h) expressly bars an FTCA suit based on any claim "arising under" the Medicare Act. Petitioners' claims here plainly arise under the Medicare Act.

This Court has held that the phrase "arising under" in Section 405(h) is to be construed broadly and applies wherever the Act provides both the "standing and the substantive basis" for presentation of a plaintiff's claim. *Salfi*, 422 U.S. at 761; *Ringer*, 466 U.S. at 615. In this case, petitioners seek a money judgment representing the profits they would have earned on reimbursement for services furnished to patients covered by Medicare (and Medicaid) if Livingston's participation in the program had not been terminated. Petitioners' standing therefore clearly rests on the Medicare Act. Moreover, petitioners challenge the termination of the agreement that HCFA and Livingston entered into pursuant to the Medicare Act, and they claim (Pet. 2-4) that HCFA's decision was erroneous because HCFA and the state agency failed to follow applicable procedures under the Act. The Medicare Act therefore also forms the "substantive basis" for presentation of petitioners' FTCA claim. *Salfi*, 422 U.S. at 761; *Ringer*, 466 U.S. at 615.[2]

The purpose and effect of Section 405(h) are to permit administrative decisions on matters arising

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[2] Contrary to petitioners' apparent contention (Pet. 6, 7, 9, 11), their FTCA claim does not fall outside the bar in 42 U.S.C. 405(h) because they seek consequential damages, which are not available under 42 U.S.C. 405(g). In *Ringer*, the Court rejected the argument that a suit may be brought under 28 U.S.C. 1331 as long as the plaintiff seeks relief other than that available under 42 U.S.C. 405(g). 466 U.S. at 615-616; see also *id.* at 624 (rejecting contention that a "claim somehow changes and 'arises under' another statute" simply because the plaintiff is not satisfied with the prerequisites to suit under 42 U.S.C. 405(g)).

under the Social Security Act to be challenged only on direct review under the procedures prescribed by the Act itself, and to foreclose collateral attacks on those decisions in separate lawsuits against the United States, the Secretary, or his agents. These carefully crafted provisions of the Act and implementing regulations would be undermined if the courts allowed recovery of consequential damages in collateral attacks on administrative decisions in suits under the FTCA. See *Ringer*, 466 U.S. at 621 (plaintiffs' claim "must be construed as a 'claim arising under' the Medicare Act because any other construction would allow claimants substantially to undercut Congress' carefully crafted scheme"); see also *Salfi*, 422 U.S. at 756-762; *Chilicky*, 487 U.S. at 424-429; cf. *United States* v. *Fausto*, 484 U.S. 439 (1988).

b. Petitioners err in relying (Pet. 5-6, 12-13, 15-16) on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), in support of their claim for consequential damages under the FTCA. The plaintiff physicians in that case challenged a regulation issued by the Secretary (through HCFA) that established the methodology to be followed by Part B insurance carriers when they determined the amount of benefits to be paid on particular claims. At the time, the applicable judicial review section of the Medicare Act (42 U.S.C. 1395ff (1982)) did not provide for review of the amount of benefits payable under Part B; the Court accordingly had held in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), that judicial review of Part B benefit amounts was precluded, and that a provider could not circumvent that preclusion by bringing an action for a money judgment against the United States under the Tucker Act. In *Michigan Academy*, the Court held that the implied preclusion of review based on 42 U.S.C. 1395ff ap-

plied only to determinations by carriers concerning the amount of benefits, not challenges to regulations issued by the Secretary. 476 U.S. at 674-678. The Court also held that 42 U.S.C. 405(h), as incorporated into the Medicare program, did not bar a challenge to the regulation in an Administrative Procedure Act suit in which jurisdiction rested on 28 U.S.C. 1331, especially in view of the strong presumption under the APA against preclusion of all judicial review of agency action. 476 U.S. at 670-673, 678-681.[3]

Petitioners' reliance on *Michigan Academy* is misplaced here for a variety of reasons. First, petitioners do not seek judicial review of agency action under the APA; they seek money damages from the United States. Although the APA itself erects a presumption in favor of judicial review, the Court has applied quite different principles where a plaintiff seeks money damages from the United States. Cf. *Bowen* v. *Massachusetts*, 487 U.S. 879, 889-901 (1988) (noting that 5 U.S.C. 702 preserves immunity of the United States from suits seeking "money damages" and contrasting such suits with ordinary APA actions). As this Court reiterated in a case decided two days after *Michigan Academy*, in the latter situation, an explicit waiver of sovereign immunity is required. See *United States* v. *Mottaz*, 476 U.S. 834,

[3] After *Michigan Academy* was decided, 42 U.S.C. 1395ff was amended to provide for administrative review as provided in 42 U.S.C. 405(b) and judicial review as provided in 42 U.S.C. 405(g) where the amount in controversy on a Part B claim exceeds $500 and $1000, respectively. See 42 U.S.C. 1395ff(b)(1) and (2). As a result of that amendment, even challenges to regulations under Part B must now be brought under the special judicial review provisions in the Medicare Act, not in a separate APA suit in which jurisdiction rests on 28 U.S.C. 1331. See 5 U.S.C. 703.

851 (1986). Here, far from waiving the sovereign immunity of the United States to damage actions, Congress has expressly barred such suits by providing in the third sentence of 42 U.S.C. 405(h) that "[n]o action" shall be brought against the United States under 28 U.S.C. 1346 (which includes the grant of jurisdiction over tort suits) to recover on any claim arising under the Medicare Act.

Second, unlike the plaintiffs in *Michigan Academy*, petitioners do not challenge any regulation or instruction of the Secretary that prescribes the methodology for making the relevant administrative determination. Instead, like the plaintiff in *Erika*, they challenge the application of governing regulations and procedures to the facts of this case. Accordingly, even if this was not a suit for money damages, *Erika*, not *Michigan Academy*, would govern—and would preclude review. *Bodimetric Health Services, Inc.* v. *Aetna Life & Casualty, supra; Texas Medical Ass'n* v. *Sullivan*, 875 F.2d 1160 (5th Cir.), cert. denied, 493 U.S. 1011 (1989); *Kuritzky* v. *Blue Shield*, 850 F.2d 126 (2d Cir. 1988), cert. denied, 488 U.S. 1006 (1989); *McCuin* v. *Secretary of HHS*, 817 F.2d 161, 164-166 (1st Cir. 1987); *Linoz* v. *Heckler*, 800 F.2d 871, 876 (9th Cir. 1986).

Third, the Court's allowance of APA review of the regulation at issue in *Michigan Academy*, notwithstanding 42 U.S.C. 405(h), rested on the premises that judicial review would otherwise have been completely barred and that Section 405(h) should be applied under the Part B Medicare program with that consequence in mind. See 476 U.S. at 678, 680-681. Here, by contrast, the Medicare Act expressly authorizes judicial review of HCFA decisions terminating a provider reimbursement agreement. See 42 U.S.C. 1395cc(h)(1). There accordingly is no occasion to

construe 42 U.S.C. 405(h) to allow a suit under the general jurisdictional grants in 28 U.S.C. 1331 and 1346.

Nothing in *Michigan Academy* suggests otherwise. Indeed, as the Court observed in *Michigan Academy*, the government argued that 42 U.S.C. 405(h), as construed in *Salfi* and *Ringer*, bars any resort to the grant of general federal-question jurisdiction in 28 U.S.C. 1331, while the plaintiff physicians argued only that *Salfi* and *Ringer* were "consistent with the view that Congress' purpose [in enacting 42 U.S.C. 405(h)] was to make clear that whatever specific procedures it provided for judicial review of final action by the Secretary were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts." 476 U.S. at 679. The Court found it unnecessary to choose between those two readings of *Salfi* and *Ringer*, because it decided that Section 405(h) should not in any event be read to preclude a challenge to a regulation where (unlike in *Salfi* and *Ringer*) judicial review is not otherwise available. 476 U.S. at 680. But since even the plaintiff physicians in *Michigan Academy* conceded that the provision for judicial review under 42 U.S.C. 405(g) is "exclusive" where it is available—and that it cannot be "circumvented" by resort to the general jurisdiction of the federal courts—the Court's decision cannot be read to hold that 42 U.S.C. 405(g) is *not* exclusive and that it *can* be circumvented by resort to the general jurisdiction of the federal courts under 28 U.S.C. 1346.

c. In addition to alleging common law negligence, petitioners allege (Pet. 14-15) that the decision terminating Livingston's certification as a Medicare provider violated due process, apparently because it was

not afforded an opportunity for a prior hearing. As an initial matter, a prior hearing is not required by the Constitution in circumstances such as these. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (parallel Title II provisions not constitutionally infirm for want of a pre-denial hearing); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980) (Medicaid patients not entitled to a hearing prior to transfer from an institution whose provider agreement had been terminated).

In any event, and contrary to petitioners' repeated contention (Pet. 7, 8, 13-15), they cannot avoid the preclusion of review in 42 U.S.C. 405(h) by casting their claim in constitutional terms. In *Salfi* itself, the plaintiffs challenged a provision of the Act on due process grounds, yet the Court held that such a challenge "arises under" the Social Security Act within the meaning of 42 U.S.C. 405(h) and that it therefore must be brought under 42 U.S.C. 405(g), not in an independent action in which jurisdiction rests on 28 U.S.C. 1331. 422 U.S. at 760-761. The Court reiterated this point in *Ringer*, 466 U.S. at 615, observing that it had recognized in *Mathews* v. *Eldridge*, 424 U.S. at 327, that federal-question jurisdiction is barred by 42 U.S.C. 405(h) even where the plaintiff raises a constitutional challenge to the administrative procedures used to terminate benefits.

Petitioners believe, however, that the special review procedures in 42 U.S.C. 405(b) and (g) are inadequate, because a provider cannot recover consequential damages for lost profits if HCFA's initial decision terminating its participation in the program is reversed on constitutional or other grounds. See Pet. 7, 14. This argument is flawed in two respects. First, the Due Process Clause does not require payment of

money damages for a violation. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976); compare *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987) (Just Compensation Clause requires payment of compensation for a taking). Second, if petitioners believed that termination of Livingston's participation without a prior hearing violated due process, they could have sought immediate judicial review under 42 U.S.C. 405(g) by arguing that their procedural due process claim was entirely collateral to the merits of the termination and that they would suffer irreparable injury if judicial review of the due process issue was postponed until after completion of administrative proceedings. The Court entertained an immediate constitutional challenge to the absence of a pre-termination hearing in *Mathews* v. *Eldridge* on precisely those grounds. See 424 U.S. at 326-332. There accordingly is no basis for petitioners' argument that they should be permitted to present their due process claim in a suit for damages under the FTCA because they could not have raised it in an action under 42 U.S.C. 405(g).[4]

d. Finally, the decision below is consistent with the decisions of other courts of appeals holding that Section 405(h) bars an action under the FTCA that

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[4] Petitioners' reliance (Pet. 7-12) on *McNary* v. *Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), also is misplaced. *McNary* was not a suit for damages under the FTCA. Moreover, as petitioners acknowledge, *McNary* involved an entirely different statutory scheme, the Immigration Reform and Control Act of 1986, which did not contain an explicit preclusion of judicial review such as that in 42 U.S.C. 405(h). Finally, as explained in the text, the special provision for judicial review under the Medicare Act, unlike that in the immigration laws, permits immediate constitutional challenges.

arises out of the administration of the Social Security Act. See *Marin* v. *HEW, Health Care Financing Agency*, 769 F.2d 590, 592 (9th Cir. 1985), cert. denied, 474 U.S. 1061 (1986); *Jarrett* v. *United States*, 874 F.2d 201 (4th Cir. 1989). Similarly, in *Bodimetric Health Services, Inc.* v. *Aetna Life & Casualty*, 903 F.2d 480 (1990), the Seventh Circuit held that Section 405(h) bars federal court jurisdiction over the state law claims of a Medicare provider. The Court denied certiorari in *Bodimetric*, 111 S. Ct. 579 (1990), and the same disposition is appropriate here, in light of the uniform holdings by the courts of appeals on the question.

2. Petitioners also contend (Pet. 12-13) that their *Bivens* action against respondent Spain should be permitted to go forward, noting that the Court found it unnecessary to decide in *Chilicky* whether Section 405(h) precludes a *Bivens* action. See 487 U.S. at 429 n.3. In our view, however, petitioners' *Bivens* claim "arises under" the Medicare Act in the same manner as their FTCA claim, since both are based on the decision by HCFA to terminate Livingston's participation as a provider under the Medicare program. But whatever the preclusive effect of Section 405(h), an implied cause of action under the rationale of *Bivens* would be flatly inconsistent with *Chilicky*. There, the Court held that the comprehensive scheme for review of decisions denying disability benefits under 42 U.S.C. 405(b) and (g) constituted a special factor precluding implication of a *Bivens* remedy. 487 U.S. at 424-429. Those same statutory provisions for administrative and judicial review govern decisions terminating participation in the Medicare program, and therefore likewise preclude implication of a *Bivens* remedy here. Petitioners cite no precedent

supporting implication of a *Bivens* cause of action in this setting in light of *Chilicky*, and we are aware of none. Accordingly, the *Bivens* issue does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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